No. 95-1271

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

USA RECYCLING, INC., FRIENDLY CARTING, INC., JOSEPH CARIONE, ANGELO CARIONE, JEAN I. CARIONE, AND LOUIS CARIONE, and CARL R. FUCCI,

Petitioners,

- against -

THE TOWN OF BABYLON, THE TOWN BOARD OF THE TOWN OF BABYLON, RICHARD H. SCHAFFER, SUPERVISOR, FRANCINE V. BROWN, COUNCILWOMAN, PATRICK HAUGEN, COUNCILMAN, ROBERT KAUFOLD, COUNCILMAN, ANTHONY TAFURI, COUNCILMAN, AND BABYLON SOURCE SEPARATION COMMERCIAL, INC.,

Respondents.

On Petition for a Writ of of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where traditional municipal police power and statute authorize monopoly public service, does an exclusive garbage collection contract, competitively bid, violate the interstate commerce clause?

2. Whether the establishment of a commercial garbage district by a municipality discriminates against out-of-state interests where both the collection and disposal contractors are selected through open, public competitive bidding which involved aggressive solicitation of bidders nationally?

3. Whether a municipality which unilaterally provides collection and disposal of commercial municipal solid waste to everyone in its commercial garbage district is a market participant?

4. Whether the district court's finding that petitioners, if successful, could be compensated by monetary damages and therefore failed to establish irreparable harm, precludes injunctive relief?

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BRIEF IN OPPOSITION

JURISDICTION

Petitioners' jurisdictional statement is complete and correct.

STATEMENT OF THE CASE

Respondent incorporates by reference the Statement of Facts in the opinion below. *USA Recycling, Inc. v. Town of Babylon,* 66 F.3d 1272 (2d Cir. 1995).

REASONS FOR DENYING THE WRIT

Contrary to petitioners' exhortations, there is no divergence between this Court's holding in *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677 (1994) and the holding by the Second Circuit in the case at bar. For most of this century the paramount role of local government to control garbage collection and disposal has been recognized by this Court. The record here and the opinion of the Second Circuit in this case demonstrate clearly that the respondent Town of Babylon properly utilized traditional municipal police power to create a commercial garbage district in a manner consistent with the principles of this Court with respect to the dormant interstate Commerce Clause and the market participant doctrine.

I. THERE IS NO NEED FOR THIS COURT TO RE-ADDRESS THE SCOPE OF MUNICIPAL POLICE POWER WITH RESPECT TO COMMERCIAL SOLID WASTE

Petitioners take the position that *Carbone* effectuated a sea change in the responsibility for municipal garbage collection and disposal. Petitioners would have this Court reverse the settled principle that garbage collection and disposal is a core function of local government in the United States. *See California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905) and *Gardner v. Michigan*, 199 U.S. 325 (1905).[1] Petitioners misstate the

[1] In *California Reduction* and *Gardner*, this Court unequivocally authorized local governments to establish municipal collection and disposal systems to the exclusion of private interests. In *California Reduction*, this Court rejected a due process challenge to San Francisco's exclusive collection ordinance stating "it is not the province of the courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community." 199 U.S. at 319. In *Gardner*, this Court rejected a takings claim with respect to Detroit's exclusive collection and disposal ordinance.

law by suggesting that in *Carbone* this Court invalidated this venerable precedent *sub silentio* and articulated some new precept of interstate commerce jurisprudence.

Local and state governments throughout the country have relied on the clear articulation of authority contained in *California Reduction* and *Gardner* and have assumed primary responsibility for the collection and disposal of solid waste. Indeed, the holdings of these venerable cases have been codified in the Resource Conservation and Recovery Act ("RCRA"), in which Congress explicitly deferred the responsibility for waste management to state and local governments. *See* 42 U.S.C. § 6901 (a)(4) (1995) ("The collection and disposal of solid waste should continue to be primarily the function of state, regional and local agencies. . . .").

The approaches employed by municipalities in their efforts to manage effectively their waste vary tremendously, running the gamut from completely private,[2] to contractual licensing[3] or franchise arrangements,[4] to exclusively

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[2] One study estimated that seventy-one percent of the local governments in the United States rely on the private sector in one form or another for garbage collection. REASON FOUNDATION, PRIVATIZATION, 1993: 17th ANNUAL REPORT ON PRIVATIZATION 6, 17-18 (1993). For instance, the Government Accounting Office recently reported that in certain areas of Colorado and New Jersey, homeowners have no alternative but to contract with commercial collection firms because local municipalities do not provide or arrange for collection services. RESOURCES, COMMUNITY, AND ECONOMIC DEV. DIV., GOVERNMENT ACCOUNTING OFFICE, REPORT NO. GAO/RCED-95-3, SOLID WASTE: STATE AND FEDERAL EFFORTS TO MANAGE NONHAZARDOUS WASTE 12 (1995).

[3] A recent survey found that thirty-six percent of cities and counties contract out to private entities for garbage collection. U.S. DEP'T OF HOUSING AND URBAN DEV., REDISCOVERING URBAN AMERICA 6-9 (Jack Sommer and Donald A. Hicks eds., 1993).

[4] For instance, California is a state that relies heavily on franchising solid waste collection services. The ability of local governments in California to grant franchises for solid waste collection

municipal collection and disposal. It is, however, the exclusive municipal collection and disposal systems which petitioners contend run afoul of *Carbone* and the dormant Commerce Clause. Petitioners' contentions are belied by applicable caselaw and the practical realities of government.

As the Court of Appeals for the Sixth Circuit noted, "[c]ourts in literally hundreds of reported cases have upheld the authority of local governments to monopolize and control local garbage collection by eliminating or restraining competition among private collectors." *Hybud Equip. Corp. v. City of Akron*, 654 F.2d 1187, 1192 (6th Cir. 1981), *vacated on other grounds*, 455 U.S. 931 (1982). *See also, Tom Hudson & Assocs., Inc. v. City of Chula Vista*, 746 F.2d 1370, 1374-75 (9th Cir. 1984) (upholding an exclusive trash collection franchise), *cert. denied*, 472 U.S. 1028 (1985). In fact, legal authority for exclusive municipal collection of solid waste can be found in almost every state. *See, e.g.*, Alaska Stat. 29.35.050(3) (1995); *United States Disposal Sys., Inc. v. City of Northglenn*, 567 P.2d 365 (Colo. 1977); *Yohe v. City of Lower Burrell*, 208 A.2d 847 (Pa. 1965); *Cassidy v. City of Bowling Green*, 368 S.W.2d 318 (Ky. 1963); *City of Rochester v. Gutberlett*, 105 N.E. 548 (N.Y. 1914).

Indeed, in reports drafted after this Court's decision in *Carbone*, federal agencies have expressly concluded that government monopoly collection and disposal services remain viable. *See, e.g.*, RESOURCES, COMMUNITY,

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is derived from a state statute. *See* Cal. Pub. Res. Code 40059 (a)(2) (1986 & Supp. 1995) (authorizing local governments to provide waste collection services by means of, among other methods, "partially exclusive or wholly exclusive franchise"). Local governments have utilized this grant of discretion to mandate that solid waste be collected by franchised haulers. *See, e.g.*, Orange County Code 4-3-56 (mandating that solid waste in unincorporated areas of the county be collected by franchised haulers on an exclusive basis).

AND ECONOMIC DEV. DIV., GOVERNMENT ACCOUNTING OFFICE, REPORT NO. GAO/RCED-95-3, SOLID WASTE: STATE and FEDERAL EFFORTS TO MANAGE NONHAZARDOUS WASTE 12 (1995) ("[C]ollection and disposal services may be owned and provided by the government. . . . For example, Los Angeles and New York City both own collection vehicles that dispose of residential waste at publicly owned and operated landfills."); OFFICE OF SOLID WASTE, ENVIRONMENTAL PROTECTION AGENCY, REPORT TO CONGRESS: FLOW CONTROLS AND MUNICIPAL SOLID WASTE III-81-82 (1995) ("Among the [waste management options] available to local governments are: providing waste collection services themselves and delivering the waste and discarded recyclables to selected facilities. . . .").

In a recent post-*Carbone* case, moreover, the Michigan Court of Appeals held that a municipality's exclusive contract for county-wide solid waste collection and the ordinances supporting the exclusive contract were constitutional. *Peninsula Sanitation, Inc. v. City of Manistique*, 526 N.W.2d 607 (Mich. App. 1994) (citing *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905) and *Gardner v. Michigan*, 199 U.S. 325 (1905)). The Court stated "the overwhelming weight of authority is that considerations of public health provide sufficient justification for the granting of an exclusive contract for the collection of solid waste." *Id.* at 610.

The decisions in the waste management arena, moreover, conform with decisions relating to state-granted monopolies in a variety of other contexts. At least five circuits and a number of district courts have upheld municipal mandates of the use of exclusive vendors.[5] For

[5] Petitioners contend that Babylon's decision to provide exclusive solid waste services is distinguishable from other services which a local government may permissibly provide on an exclusive basis. Petition at 19. For instance, petitioners concede that exclusive municipal street sweeping and street lighting is permissible, but only because the municipality provides such mandatory services

example, in *Transport Limousine of Long Island, Inc. v. Port Auth. of New York and New Jersey*, 571 F. Supp. 576 (E.D.N.Y. 1983), an exclusive airport livery service was upheld. Of particular interest, in *Gold Cross Ambulance and Transfer v. City of Kansas City*, 705 F.2d 1005 (8th Cir. 1983), *cert. denied*, 471 U.S. 1003 (1985), the court upheld the city's right to eliminate competition and establish exclusive ambulance services within the city. Likewise, in *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990), the Ninth Circuit upheld a State Bar resolution requiring all attorneys to purchase malpractice insurance from the Bar. This measure was validated even though out-of-state insurance carriers were barred from competing within the Oregon market. The persistent theme in these cases is that where municipal police power is exercised in reasonable response to a traditionally local concern, the courts will not interfere.[6]

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solely to government entities. Petition at 19 n.12. Petitioners contention is, however, belied by the host of instances where local governments have been upheld in their efforts to mandate that private entities utilize exclusive municipal services despite the fact that a ready private market for those same services was in existence.

[6] *See generally, Mercy-Peninsula Ambulance, Inc. v. San Mateo County*, 791 F.2d 755 (9th Cir. 1986) (exclusive paramedic services); *Sand Crest Outpatient Serv., PA v. Cumberland County Hosp. Sys., Inc.*, 853 F.2d 1139 (4th Cir. 1988) (exclusive emergency room services); *City Communications, Inc. v. City and County of Detroit*, 888 F.2d 1081 (6th Cir. 1989) (cable franchise); *Hillman Flying Serv., Inc. v. City of Roanoke*, 652 F. Supp. 1142 (W.D. Va. 1987), *aff'd*, 846 F.2d 71 (4th Cir. 1988) (single aviation fuel vendor at airport); *Sea Air Shuttle Corp. v. Virgin Island Port Auth.*, 782 F. Supp. 1070 (D.V.I. 1991) (exclusive use for seaplane ramps); *Englert v. City of McKeesport*, 637 F. Supp. 930 (W.D. Pa. 1986) (single vendor for electrical inspection services); *Monarch Entertainment Bureau, Inc. v. New Jersey Highway Auth.*, 715 F. Supp. 1290 (D.N.J.), *aff'd*, 893 F.2d 1331 (3d Cir. 1989) (exclusive management contract for concert facility); *Coastal Neuro-Psychiatric Assoc., PA v. Onslow Memorial Hosp., Inc.*, 795 F.2d 340 (4th Cir. 1986) (exclusive contract with radiologist); *Allen Group, Inc. v. Aducci*, 123 A.D.2d 91, 510 N.Y.S.2d 747

In addition, New York State has explicitly authorized Babylon to manage, on a town-wide basis, all solid waste generated within the Town. Session Laws of 1985, Ch. 478 § 1. *See* Respondents' Appendix. Chapter 478 expressly declares that with respect to solid waste, it is *"the policy of the state of New York . . . to displace competition with regulation or monopoly public service." Id.* at § 2 (emphasis added). Clearly articulated state policies of this variety, which authorize the displacement of competition with monopoly public service, exempt states and their subdivisions from the strictures of the antitrust laws. *See Parker v. Brown*, 317 U.S. 341 (1943); *City of Lafayette v. Louisiana Power & Light*, 435 U.S. 389 (1978).

Petitioners, moreover, neglect to mention the fact that years ago the Town established a residential garbage district. Thus, for almost a decade, Babylon has utilized, on an exclusive basis, a company selected by competitive bidding to collect and dispose of residential garbage. Notwithstanding the exclusive residential collection district, petitioners urge that an exclusive commercial garbage district violates the dormant Commerce Clause. Carried to its logical extension, petitioners would have this Court rule that exclusive residential garbage collection and disposal violates the Commerce Clause.

It is indisputable that, pursuant to its police powers, a municipality may mandate the exclusive use of a municipally designated service provider. To rule that the Town lacks the authority to mandate exclusive service providers in an arena clearly within its broad police powers would run counter to a significant body of law and the practical realities of the way government works.

Petitioners would have this Court invalidate, in addition to Babylon's commercial garbage district, each of

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(App. Div. 3d Dep't 1987) ("sole source" contract for vehicle emission analyzers).

the referenced exclusive franchises, for whenever a government creates a monopoly, out-of-state entities "are deprived of access to local demand for their services." *Carbone*, 114 S. Ct. at 1683. In essence, petitioners contend that *Carbone* served to eliminate certain traditional state functions from the province of local government. This contention leads inexorably to the conclusion that, in addition to *California Reduction, Gardner*, and their progeny, the State action exemption also was overruled in *Carbone*.

It is inconceivable that this Court would have rendered such a revolutionary ruling by implication. *See Payne v. Tennessee*, 501 U.S. 808, 833-35 (1991) (Scalia, J., concurring) (discussing the "principle that the settled practices and expectations of a democratic society should generally not be disturbed by the courts"). Petitioners' portrayal of *Carbone* as fundamentally altering the manner in which local governments function simply is not plausible.

In the district court, co-plaintiffs A.A.&M.[7] conceded that the Town could effectuate its district with municipal employees and equipment. The petitioners at bar specifically refused to acknowledge the municipal police power to take direct responsibility for garbage collection. They reason that *Carbone* precludes municipalities from performing the role of local garbage collection and disposal. Petitioners' interpretation of *Carbone* is mistaken.

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[7] When Babylon established its commercial garbage district, two law suits were filed in federal district court more or less simultaneously. Although they were not formally consolidated, both cases, *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272 (2d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3561 (U.S. Feb. 12, 1996) and *A.A. & M. Carting Service, Inc. v. Town of Babylon*, 66 F.3d 1272 (2d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3534 (U.S. Jan. 30, 1996) have proceeded in lockstep and were both the subject of the Second Circuit ruling which is the subject of these petitions for writs of *certiorari* brought by A.A. & M. Carting Service, Inc., et al. and USA Recycling, Inc., et al.

Notably, this Court denied *certiorari* in *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), *cert. denied*, 64 U.S.L.W. 3557 (U.S. Feb. 20, 1996). This denial occurred after the petition at bar was filed and before Babylon's opposition was due. Suffice it to say that Babylon's commercial garbage district does not place an impermissible burden on interstate commerce because the taxpayers rather than the garbage haulers pay for collection and disposal directly in their tax bills [8] and because there was competitive bidding for collection and for disposal which were open to in-state and out-of-state entities on an equal basis.

Petitioners next claim that there is a split among the Circuits. Petitioners urge that *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788 (3d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3510 (U.S. Jan. 16, 1996), decided by the Third Circuit, is inconsistent with the Second Circuit's opinion in the case at bar. Both Circuits have, however, assiduously adhered to the principles articulated in *Carbone*.

In *Harvey*, the Third Circuit analyzed whether the waste management systems at issue discriminated against interstate commerce by favoring in-state interests or disadvantaging out-of-state interests. In making this evaluation, the Third Circuit examined the process by which a single service provider was designated to ascertain whether or not out-of-staters in practice enjoyed equal access to the local market. 68 F.3d at 805-06, 808. The Third Circuit concluded that a municipality could choose a single provider, without violating the interstate Commerce Clause, "so long as the selection process was open and competitive and offered truly equal opportunities to

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[8] Babylon is not engaging in revenue generation at the expense of out-of-state competitors—it is utilizing its taxing authority to impose costs on its commercial and residential tax bases. As noted in *City of Philadelphia v. New Jersey*, a government "has every right to protect its residents' pocketbooks as well as their environment." 437 U.S. 617, 626 (1978).

in-state and out-of-state businesses." *Id.* at 798. Similarly, the Second Circuit in the case at bar upheld Babylon's selection process, noting that "[d]espite the plaintiffs' protestations to the contrary, none of these factors detracted from the nondiscriminatory nature of the Town's bidding process, or resulted in any undue burdens on interstate commerce." 66 F.3d at 1290.

The Tenth Circuit has applied a similar analysis. *See Blue Circle Cement v. Board of County Commissioners*, 27 F.3d 1499, 1512 (10th Cir. 1994). The Third Circuit also applied this reasoning in *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 48 F.3d 701 (3d Cir. 1995) and held that New Jersey's designation process favored in-state facilities and therefore did not provide a "level playing field". *Id.* at 713.

Petitioners also maintain that the Second Circuit failed to consider *Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority*, where the Eleventh Circuit let stand, without an opinion, an Alabama district court decision rejecting a mandatory flow control scheme. 29 F.3d 641 (11th Cir. 1994), *affirming*, 814 F. Supp. 1566 (M.D. Ala. 1993). As Babylon's waste management plan differs dramatically from the flow control ordinances challenged in *Waste Recycling*, petitioners' argument is flawed.

Waste Recycling involved the Southeast Alabama Solid Waste Authority, a public, non-profit corporation, organized by various municipalities to address their solid waste management needs. Three member cities signed "user contracts" with the Authority to utilize its solid waste services. Unlike Babylon's plan, these contracts required that each city adopt a "flow control" ordinance *mandating* that all solid waste collected within its boundaries by public or private collectors be delivered only to the Authority's facility. The user contracts also required that each city not authorize or approve any competing dis-

posal sites within its borders. The *Waste Recycling* plan, therefore, differs markedly from Babylon's provision of municipal waste management services.[9] Indeed, the approach in *Waste Recycling* is similar to the contractual approach this Court declined to review in *SSC Corp.* Consequently, *Waste Recycling* should provide no solace to petitioners here.

In sum, the Town of Babylon has followed the precepts set down by this Court in *Carbone.* Both the Second and Third Circuits have analyzed the varying fact-specific systems challenged and ruled in a fashion consistent with this Court's teaching in *Carbone* and this Court's interstate commerce jurisprudence.

II. THE SECOND CIRCUIT'S OPINION IS CONSISTENT WITH THIS COURT'S PRIOR MARKET PARTICIPANT DECISIONS

Petitioners assert that the Second Circuit's decision is not supported by this Court's prior market participant decisions in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *White v. Massachusetts Council of Construction Employers*, 460 U.S. 204 (1983); and *South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984).[10] In particular, petitioners assert that the Second Circuit ignored the regulatory aspect of Babylon's waste management system. Petition at 22.

Petitioners, however, completely misstate the Second Circuit's opinion. The Second Circuit expressly found

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[9] In addition, the court in *Waste Recycling* suggested that "*ad valorem* taxes, or utility bill assessments", measures which are similar to those adopted by Babylon, would be acceptable alternatives. 814 F. Supp. at 1581.

[10] In support of their market participation argument, petitioners mistakenly rely on *Wyoming v. Oklahoma*, 502 U.S. 437 (1992). However, this Court did not analyze the statute at issue there under the market participant doctrine.

that the market participant doctrine does not apply to the regulatory aspect of Babylon's waste management system, *i.e.*, "the Town's decision to replace the private market for commercial garbage collection with uniform municipal collection." 66 F.3d at 1282. Rather, on finding that the Town's creation of the commercial garbage district did not discriminate against interstate commerce, the Second Circuit applied the *Pike* balancing test and held that the Town's waste collection system did not impose incidental burdens on interstate commerce that were excessive in relation to the local benefits. *Id.* at 1286-88. Thus, petitioners' assertion that the Second Circuit wrongly applied the market participant doctrine to the "regulatory aspects of the Babylon scheme" is completely baseless.

Additionally, in a wane attempt to support their untenable position, petitioners seek to distinguish this case from the market participant decisions decided previously by this Court. Petition at 21-22. According to petitioners, the "critical distinction" is that unlike the prior cases, by creating the commercial garbage district the Town is forcing generators of solid waste to use the Town's services. *Id.* at 21. Once again, however, petitioners completely overlook the fact that the Second Circuit did not apply the market participant doctrine to the creation of the district here. In fact, the Second Circuit addressed this argument directly.

> No one enjoys a monopoly position selling garbage collection services in Babylon's commercial garbage market, because the Town has eliminated the market entirely. Not even the Town itself remains as a seller in the market. Although the Town is now the lone provider of garbage collection services in the District, it does so as a local government providing services to those within its jurisdiction, not as a business selling to a captive consumer base.

66 F.3d at 1283.

To the extent that petitioners implore this Court to consider the "design and effect" of the Town's waste management system (Petition at 18), even if each component of the system is valid, petitioners position is not supported by this Court's prior market participant decisions. For example, in *South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984), this Court rejected the "design and effect" approach by distinguishing and considering separately for purposes of applying the market participant doctrine, each activity in which the State was involved. It was only after finding that the State was not a participant in the timber processing market, but only the timber sales market, that this Court held that the State of Alaska could not impose restrictions on the processing market under the guise of the market participant doctrine. *Id.* at 99.

In the case at bar, the Second Circuit fully considered and correctly decided the issues in accordance with the limitations of the market participant doctrine established by this Court. Rather than look at the total effect of the Town's waste management system, as petitioners urge, the Second Circuit was careful to distinguish each component of the system, including the Town's decision to replace the private market for commercial garbage collection with a uniform municipal collection system, as required under *Wunnicke*. 66 F.3d at 1282.

Finally, notwithstanding petitioners' assertion that the scope of the market participant doctrine is in need of clarification, this Court has refused the opportunity to address the market participant doctrine on at least seven occasions, most recently in *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), *cert. denied*, 64 U.S.L.W. 3557 (Feb. 20, 1996).[11] The Second Circuit's

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[11] See *also, Trojan Technologies, Inc. v. Pennsylvania*, 916 F.2d 903, 909-12 (3d Cir. 1990), *cert. denied*, 501 U.S. 1212 (1991); *Swin Resources Sys., Inc. v. Lycoming County*, 883 F.2d 245, 248-51 (3d Cir. 1989), *cert. denied*, 493 U.S. 1077 (1990); *Shell Oil Co. v.*

decision at bar is consistent with the market participant doctrine established by this Court and therefore, there is no reason for this Court to grant a writ of *certiorari*.

III. NO FURTHER DIRECTION FROM THIS COURT IS NEEDED REGARDING DEPRIVATION OF A CONSTITUTIONAL RIGHT AND IRREPARABLE INJURY

The Second Circuit upheld the district court's explicit finding that petitioners have not demonstrated irreparable harm. The Second Circuit found that "[b]ecause the record supports the district court's determination that plaintiffs' alleged injuries would be entirely financial—and therefore remediable by an award of money damages —we cannot say that the district court clearly erred when it found that the plaintiffs had not demonstrated irreparable harm." 66 F.3d at 1295.

Petitioners ask this Court to establish a bright line as to whether the deprivation of a constitutional right constitutes irreparable harm for purposes of obtaining a preliminary injunction. Petition at 20-24. This Court, however, has already decided that deprivation of a constitutional right does not automatically constitute irreparable injury. In *Socialist Workers Party v. Attorney General of U.S.*, 419 U.S. 1314, 1318 (1974), this Court upheld the Second Circuit's denial of injunctive relief even though the applicants seeking to enjoin the FBI from attending a national convention of the youth organization of the Socialist Workers Party claimed that the FBI's activities would have a "chilling effect" on their First Amendment rights.

City of Santa Monica, 830 F.2d 1052, 1056-58 (9th Cir. 1987), *cert. denied*, 487 U.S. 1235 (1988); *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983); *Smith v. Georgia Dept. of Agriculture*, 630 F.2d 1081, 1083 (5th Cir. 1980), cert. denied, 452 U.S. 910 (1981).

Petitioners misstate the law by asserting that there is a conflict among the lower courts on this issue. Petition at 27-28. Petitioners, however, fail to consider that irreparable harm is a factual issue within the discretion of the trial court, and cannot be subject to the bright line test which they now seek. *See, e.g., Socialist Workers Party*, 419 U.S. at 1318 (Supreme Court noted with approval that the Court of Appeals had "analyzed the competing interests at some length"); *Hohe v. Casey*, 868 F.2d 69 (3d Cir.), *cert. denied*, 493 U.S. 848 (1989) (assertion of First Amendment right does not automatically require finding of irreparable injury). The conclusion that an injury is irreparable involves considerations of preserving the status quo, whether an adequate remedy at law exists, public policies and interests, and the possibility of harm to other interested persons. *See Eli Lilly & Co. v. Premo Pharmaceuticals Laboratories, Inc.*, 630 F.2d 120, 136 (3d Cir.), *cert. denied*, 449 U.S. 1014 (1980).

Petitioners, however, avoid any discussion of the facts in this case and the cases on which they rely in order to create the illusion of a conflict among the lower courts. Petitioners' Appendix at 49a, 51a. However, as the Honorable Thomas C. Platt recognized in the district court, the facts of this case are clearly distinguishable from those where fundamental freedoms are at issue.[12] *Id.* at 49a.

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[12] In the case at bar the district court stated:

> In any event, I understand what the parties have expounded to me, namely, the plaintiffs say that they will suffer irreparable harm by virtue of the fact that 75 or 90 percent of lost profits on behalf of one or more of the plaintiffs, but there is a—there is no irreparable harm in the totally destructive sense, and it is a question of monetary damages.
>
> And while, in the case of First Amendment constitutional violations, there is very rarely a case that you could be made whole by monetary damages, in a case of this kind I think the likelihood of not being able to be compensated for monetary damages is probably pretty thin.

Petitioners' Appendix at 49a.

Petitioners' analysis is therefore faulty and they have failed to raise a valid issue worthy of this Court's review.

CONCLUSION

This Court should deny a writ of *certiorari* on all issues raised in the Petition.

Respectfully submitted,

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APPENDIX

APPENDIX

BABYLON, TOWN OF—MANAGEMENT OF SOLID WASTE

NEW YORK SESSION LAWS OF 1985

CHAPTER 478

Approved and effective July 19, 1985

Message of necessity, pursuant to Art. III, sec. 14, of Const.

AN ACT authorizing and empowering the town of Babylon to adopt a local law for the management of solid waste generated within such town

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Notwithstanding the provisions of any general, special or local law to the contrary, the town of Babylon is authorized to adopt and amend a local law to be known as the solid waste management law. Such law shall provide for the management on a town-wide basis of all solid waste generated within the town of Babylon. Such law shall also authorize the town, directly or by contract with a public or private corporation, authority or industrial development agency, through its commissioner of sanitation, or such other department head as may be designated by the town board, to supervise and regulate the transportation, disposition and collection of all or part of any solid waste within the town, pursuant to standards established in such local law. Such standards in the local law shall not be inconsistent with standards established pursuant to the environmental conservation law.

§ 2. It is hereby declared to be the policy of the state of New York with respect to the collection, trans-

portation, delivery, storage, processing and disposal of solid waste in the town of Babylon, in the county of Suffolk, to displace competition with regulation or monopoly public service. In furtherance of this policy, the town of Babylon is hereby authorized to adopt a local law (1) to exclusively control all solid waste and all energy and materials derived therefrom, including without limitation the collection, transportation and delivery of solid waste to a designated resource recovery facility or facilities within the town of Babylon for storage or processing or for any other disposition or handling; and (2) to provide for the establishment and collection from time to time of charges as compensation for the service of disposing or handling of such solid waste, all in order to assure a regular solid waste collection and disposal or handling service for the people of the town of Babylon. The town shall not prohibit municipalities located wholly or in part within the town from engaging in the collection or transportation of such solid waste to the designated resource recovery facility.

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